(2)

No. 98-7540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCOTT L. CARMELL — PETITIONER

(Your Name)

VS.

THE STATE OF TEXAS — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[✓] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Trial court and the Second Court of Appeals at Fort Worth, Texas

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Scott L. Carmell

(Signature)

35 pp

98-7540

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Scott Leslie Carmell, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. March 1995; Approx. $500.00/ mthly.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: Dec. 1 —, 1998.

Scott L. Carmell
(Signature)

No. 98-7540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCOTT L. CARMELL — PETITIONER
(Your Name)

VS.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND COURT OF APPELS AT FORT WORTH, TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Leslie Carmell #777548
(Your Name)

2101 FM 369 North
(Address)

Iowa Park, Texas 76367-6568
(City, State, Zip Code)

(Phone Number)

98-7540
Carmell
v.
Texas

QUESTION(S) PRESENTED

(1)

Whether the Texas Court of Appeals erred in concluding that application of the 1993 version of Texas's article 38.07, Code of Criminal Procedure, was not ex post facto when: (i) the offense occurred in 1992, a full year before adoption of the new rule of law; (ii) there was no outcry for approximately three years, and the law in effect at the time required outcry within 6 months; and, (iii) the petitioner would have otherwise been entitled to an acquittal, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

(2)

Whether the Texas Court of Appeals erred in concluding that evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

(3)

Whether the Texas Court of Appeals erred in concluding that testimony of "genital area" and "pubic hair" were constitutionally sufficient to support the conviction when the terms are not interchangeable, when they do not mean the same thing, and when they do not include the female sexual organ as defined by statute, in violation of the Fifth and Fourteenth Amendments to the United States Constitutions.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (Contd)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[✓] reported at 963 SW2d 833; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the criminal appeals court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[✓] For cases from state courts:

The date on which the highest state court decided my case was February 12, 1998. A copy of that decision appears at Appendix A.

[✓] A timely petition for rehearing was thereafter denied on the following date: March 26, 1998, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

[✓] A petition for discretionary review was thereafter denied on the following date: September 16, 1998. A copy of that decision appears at Appendix C.

STATEMENT OF THE CASE

On January 10, 1997, the Petitioner was convicted by jury in Denton County, Texas for sexual assault and indecency with a child, to-wit, his 15 year old step-daughter who testified they were "married." In a published opinion, the conviction was affirmed by the Second Court of Appeals at Fort Worth, Texas on February 12, 1998. See Appendix - A. Motion For Rehearing was denied without written order on March 26, 1998, Appendix - B, and the Petitioner's pro se Petition For Discretionary Review was denied without written order by State's highest criminal appeals court on September 16, 1998. Appendix - C.

The Texas court of appeals decision in this case is in conflict with other state and federal appeal court's opinions regarding whether article 38.07, Texas Code of Criminal Procedure is substantive. The new article, adopted in 1993 but applied to Petitioner for an offense that occurred in 1992, changed the amount of evidence necessary to obtain a conviction and eliminated a defense and possible acquittal that was otherwise available to the Petitioner. Its application here violated state and federal statutes and constitutional mandates against ex post facto laws. The court of appeals compounded that error by concluding that evidentiary rule 608(b) controlled the prosecutor's misconduct where he intentionally withheld favorable evidence from the accused that was beneficial to the defense and, finally, the court of appeal unfairly reduced the government's burden of proof by holding that the evidence was sufficient to sustain the conviction when the terms "genital area" and "pubic hair" have never previously been defined by statute or case law as being part of the female sexual organ.

REASONS FOR GRANTING THE PETITION

REASON FOR RELIEF NO. 1 - RESTATED

The Texas Court of Appeals erred in concluding that application of the 1993 version of Texas's article 38.07, Code of Criminal Procedure, was not ex post facto when: (i) the offense occurred in 1992, a full year before adoption of the new rule of law; (ii) there was no outcry for approximately three years, and the law in effect at the time required outcry within 6 months; and, (iii) the petitioner would have otherwise been entitled to an acquittal, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Arguments And Authorities

The Texas court of appeals decided an important questions of federal law that has not been but should be decided by this Court insofar as it has a far-reaching effect on many other people in the same or similar situation, whether in this state or not, and which is in conflict with other decisions of this Court and of the Texas courts. That is, the Texas court of appeals has misconstrued an issue of law to the petitioner's disadvantage, i.e., whether a state law passed in 1993 is an ex post facto application when applied to the instant case, which occurred prior to the passage of the 1993 version of article 38.07, Texas Code of Criminal Procedure.

In count seven of the indictment, the government charged the petitioner with sexual assault under Texas Penal Code Section 22.011. The government alleged the incident occurred when the complainant, the petitioner's disgruntled step-daughter, was 14 years old. (The complainant was born March 24, 1978 and the incident was alleged to have happened on June 1, 1992). Under Texas law, a conviction under Penal Code Section 22.011 is a second degree felony when the complainant is 14 years of age or older, and conviction under 22.021 is a first degree felony when

the complainant is thirteen or under. The Texas Code of Criminal Procedure, article 38.07, in effect at the time of the alleged offense, held that a conviction under either statute was not supportable on the uncorroborated testimony of a complainant unless that complainant informed a person other than the defendant of the alleged offense within six (6) months of the alleged offense. Here, the complainant's testimony was uncorroborated and the alleged 'outcry' did not come until some three (3) years later.

In May 1993, almost a year after the date of the alleged incident, Texas amended its statute to eliminate the 6-month outcry witness requirement for a 14 year old. The new amendment now extended the outcry to one full year, and then only if the alleged victim was eighteen years or older. Although the incident alleged against the petitioner was supposed to have occurred in June 1992, the prosecutor applied the law of 1993 to a case that was being tried before a jury in January 1997. Had the Texas court of appeals applied the law in effect at the time of the alleged incident, the petitioner would have been entitled to an acquittal because there was no outcry testimony within the 6 months as required by statute to support the uncorroborated testimony of the alleged complainant. Hence, when the government applied the 1993 law against the petitioner in 1997 for an incident that allegedly happened in 1992, the petitioner was deprived of a favorable defense at trial and on appeal - both of which would have resulted in an acquittal. Moreover, the application of the 1993 law unfairly reduced the government's

burden while simultaneously increasing the petitioner's burden. On intermediate appeal and during petition for discretionary review, the Texas courts did not address the issue that application of the new law deprived the petitioner of an affirmative defense and an acquittal. Instead, and without comment, the appeal court simply applied the 1993 amended version retroactively and against the Federal and State constitution's prohibitions against ex post facto laws, and then affirmed the conviction.

According to Texas's own case law, the purpose of the older 1983 version of article 38.07 was to require stricter proof of offenses allegedly committed against complainants age fourteen and over. See Scoggan v. State, 799 S.W.2d 679, 683 (Tex.Cr.App. 1990) (corroboration requirements not met so evidence insufficient). Other Texas courts have entered acquittals in similar situations. Please see and consider: Friedel v. State, 832 S.W.2d 420 (Tex.Ap.-Austin 1992); Jones v. State, 789 S.W.2d 330 (Tex.App.-Houston [14th Dist.] 1990); Hill v. State, 658 S.W.2d 705 (Tex.App.-Dallas 1983); Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996).

In this case, the government's 1997 application of the 1993 law to a 1992 offense resulted in an unconstitutional ex post facto application for the reason that it changed the rules of evidence against the accused to require less proof to convict him and deprived him of an affirmative defense and, finally, it deprived him of an acquittal that he would have otherwise been entitled to had he been tried under the law in effect at the time

of the alleged offense. Please see and compare Lindsey v. State, 672 S.W.2d 892, 894 (Tex.App.-Dallas 1994) and Bowers v. State, 914 S.W.2d 213, 217 (Tex.App.-El Paso 1996) with this Court's decision in Collins v. Youngblood, 110 S.Ct. 2715 (1992), and Texas's reasoning and application of Youngblood in Ex Parte Hallmark, 883 S.W.2d 672 (Tex.Cr.App. 1992) and Grimes v. State, 807 S.W.2d 582 (Tex.Cr.App. 1991). Hence, certiorari should be granted because Texas's application of the 1993 law to the facts of this case violated the Supreme Court's prohibitions against ex post facto law under the Fifth and Fourteenth Amendments to the United States Constitution.

REASON FOR RELIEF NO. 2 - RESTATED

The Texas Court of Appeals erred in concluding that evidentiary criminal rule 608(b) was properly dispositive of the prosecutor's intentionally withholding evidence that was favorable to the accused, in violation of the Sixth and the Fourteenth Amendments to the United States Constitution.

Arguments And Authorities

The Texas court of appeals seriously misconstrued evidentiary rule 608(b) (the same as the federal evidentiary rule) insofar as the court declared that the prosecutor could use Rule 608 to intentionally withhold evidence from the accused by claiming that the evidence was inadmissible impeachment material, and without testing the government's claim or analyzing the truth of the evidence. Thus, the Texas courts have so far departed from the accepted course of proceedings as to call for this Court to exercise its supervisory powers to enforce and uphold the Constitution of the United States of America.

The petitioner has not enjoyed one fair proceeding in any state court below. His trial was saturated with incompetent, unreliable and prejudicial hearsay testimony, the appeal was half reasoned and applied archaic law while using modern vernacular and offering little more than lip service in an opinion directed as supporting a conviction rather than upholding constitutional principles.

Here, the Texas court of appeals was wrong to hold that testimony about the accused's wife having extra-marital sexual relations with another man and that she had his baby, would not be admissible as impeachment material. See Appendix-A, at page 10, citing Rule 608(b) and Ramos v. State of Texas, 819 S.W.2d 939 (Tex.App.-Corpus Christi 1991). Evidence of a witness's bias is admissible as impeachment material, especially evidence that a married woman has another man's baby at about the same time she and her daughter bring serious charges against her husband. Such evidence is admissible to show her character, her integrity, and her reliability for truthfulness. In the instant case, the evidence of the wife's extramarital affair before her separation from the husband she is testifying against would clearly expose her bias, and should have been admitted into evidence for the jury's informed deliberation.

Evidence of a witness' bias is critical to the fairness and proper functioning of the adversarial process. It is part of the truth seeking function of the trial, a very integral and real part of fairness that should not have been hidden in this case by the prosecutor. Juries cannot weigh evidence and testimony

without full knowledge of the witnesses' motivations. A witnesses' motive for testifying for the government should never be allowed hidden from the jury behind words like 'irrelevant' or 'immaterial.' Davis v. Alaska, 94 S.Ct. 1105 (1974), and Steve v. State of Texas, 614 S.W.2d 137 (Tex.Cr.App. 1981).

Great and fair latitude should be allowed the accused to show animosity, bias, or motive on part of an adverse witness. Juries have a right to fairly weighing the evidence, and part of that right includes weighing of the witnesses' credibility for truthfulness. In this case, no greater tool exists on today's modern legal market for the mother than use of the courts to secure what she wants. In one sweep she takes home, car, bank accounts, property and children, and rids herself of a husband she no longer wants while enjoying her affair and having another man's baby.

In Davis this Court wrote that "the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id., 94 S.Ct. at 1110, citing authorities. Although the Texas courts have applied Davis and reached the same conclusion, see Evans v. State of Texas, 519 S.W.2d 868 (Tex.Cr.App. 1975), that conclusion was not but should have been applied in this case.

It cannot be ignored or forgotten that the petitioner's wife gave birth to another man's baby at about the same time she was working with the government to imprison her husband. It also cannot be ignored, excused, or disregarded that the prosecutor purposely and intentionally lied to the defense when counsel

asked the prosecutor whether the baby in the courtroom belonged to the defendant's wife, and the prosecutor said that it did not. It is uncontroverted that the prosecutor lied to defense counsel. That, within itself, was a deliberate misconception and an abuse of the discovery process. It was clearly designed to deprive the accused of favorable testimony on cross, and impeachable testimony that would have damaged the State's case in the eyes of the jury which, of course, the prosecutor knew. For this reason, the Texas court of appeals erred in holding that evidentiary rule 508(b) controlled to exclude the evidence in that the evidence was admissible to show motive, bias and prejudice on the witness's part. Hence, the jury had a right to hear the evidence of who the child belonged to, and the petitioner had a right for his jury to hear the evidence insofar as it related to the credibility of the government's witness. Because the error contributed to the conviction, the verdict should be reversed and this matter remanded for further proceedings.

REASON FOR RELIEF NO. 3 - RESTATED

The Texas Court of Appeals erred in concluding that testimony of "genital area" and "pubic hair" were constitutionally sufficient to support the conviction when the terms are not interchangeable, when they do not mean the same thing, and when they do not include the female sexual organ as defined by statute, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The texas court of appeals has decided an important question of state and federal law not previously decided, and which could have a significant impact on similar type cases in all states, in declaring that pubic "hair" and genital "area" constitute part of the female sexual organ for purposes of sexual related offenses.

The question presented here is whether the Texas courts erred in equating a female's genital "area" or her pubic "hair" with her vulva, the vagina or vaginal canal, the uterus, mons pubis, or the labia. These terms are not synonymous and interchangeable as the government would like the public to believe. Common sense and even the slightest education says that the term genital "area" includes much more than just the labia minora or mons pubis. LIkewise, pubic "hair" in no way equates with the vaginal canal or the uterus. As a matter of logic and common sense, as well as logistics, genital "area" means the area around and including the genitals. This area, then, includes the female sexual organs and other parts of anatomy <u>not</u> identified with the female sexual organs. By analogy, if a person has been in the Washington area have they actually been to Washington, then? Or would being in Alexandria or Baltimore qualify as a substantive proof of being in Washington per se? However, being in Washington places one in the Washington area. But the Washington area does not necessarily place one in Washington. In this token, touching one in the genital "area" does not necessarily mean or include touching one on the vulva or vagina. And touching one's pubic hair does not equate with touching one's labia minora. Pubic hair does not necessarily include the female sexual organ for the reason that it is not unusual for pubic hair to extend from the navel to the thigh area. If the Texas court's logic were correct, which it is not, then it would be a sexual offense to touch one's navel or even their mid- to lower thigh area. Legislatures, however, chose to identify the female sexual

organ by statute. And that definition does not include pubic hair or genital area as being part of the female sexual organ--as the court appears to legislate from the bench. Hence, the term genital "area" indicates the area around the genitals while pubic "hair" extends far past the genitals, genital area, and the female sexual organ.

If the contact of which the witness complained was in the genital area but not on the genitals themselves, then no offense was committed under state or federal law. Because the question is not resolved by the evidence on record, a reasonable doubt exists as to the essential elements of the offense. The terms genital "area" and pubic "hair" simply are not interchangeable with each other or other parts of the female anatomy and are therefore not legally sufficient to sustain the conviction. They are too vague and too poorly defined to sustain a conviction in a case where the constitution requires proof beyond a reasonable doubt. Had the indictment alleged merely pubic "hair" or genital "area," it would have been subject to motion to quash for failure to follow the necessary statutory language, and for failure to put the accused on proper notice.

The constitution and the criminal statute require proof of contact with the female "sexual organ," and not "in the area of" the female sexual organ. Here, the Texas court of appeals held that the navel and the upper and lower thigh area are equivalent to or are parts of the female reproductive organs, resulting in unwarranted legislation from the bench and making it a criminal offense to touch one in the area of the thigh or navel, despite

any legislature ever doing so. At no time did the complainant testify that the petitioner ever touched her "vagina" or her "genitals." The complainant was very intelligent and well educated lady, studying to be a psycho therapist. Had she been a small child or uneducated, handicapped or unlearned, then a reasonable person could allow latitude for the expansion of a definition. But that is not the case here. Instead, the government sought to expand the statute to include definitions and areas of the anatomy which legislation carefully and purposely decided against.

In revieving the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution. Jackson v. Virgina, 99 S.Ct. 2781 (1979); Geesa v. State of Texas, 820 S.W.2d 154 (Tex.Cr.App. 1991). In Jackson, this Court held that the evidence was legally insufficient if no rational trier of fact could find proof of guilt on each essential element of the offense beyond reasonable doubt. Petitioner submits that he has raised more than enough doubt to undermine the reasonableness of the verdict. The government simply should not be allowed to expand the definition of a statute or an offense beyond what the legislature has chosen in order to sustain a conviction that at the least is insupportable and at the worst is obtained through linquistic gymnastics. Clearly, the government has failed to meet its burden of proof and the conviction must therefore be reversed.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the conviction should be reversed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott L. Carmell

Date: December 1, 1998

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

Scott Leslie Carmell	§	From the 367th District Court
	§	of Denton County (F-96-1227-E)
vs.	§	February 12, 1998
	§	Per Curiam
The State of Texas	§	(p)

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgments of the trial court.

It is the order of this Court that the judgments of the trial court are affirmed.

PETITIONER'S APPENDIX- A

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

SCOTT LESLIE CARMELL — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY

OPINION

I. Introduction

Appellant Scott Leslie Carmell was convicted of eight counts of indecency with a child, two counts of aggravated sexual assault, and five counts of sexual assault against his stepdaughter K.M. The jury assessed punishment at life on the aggravated sexual assault counts and 20 years on the remaining counts. In six points, appellant argues that (1) the trial court erred in denying his motion for new trial because the State did not disclose impeachment evidence and (2) the evidence was legally insufficient to support the aggravated sexual assault convictions, one of the indecency convictions, and one of the sexual assault convictions. Because we find that the impeachment evidence would not have been admissible and that the evidence was legally sufficient, we affirm the convictions.

II. Legal Sufficiency of the Evidence

In five points, appellant challenges the legal sufficiency of the evidence regarding four of the convictions.[1] We will try to limit the recitation of the facts to these four counts as much as possible due to the disturbing and graphic nature of this case.

A. Factual Background

Ron Borchert and Eleanor Alexander married in 1972. K.M. was born on March 24, 1978. Eleanor began to see appellant, a counselor specializing in counseling victims of incest, because she was an incest survivor. In early 1987, Eleanor divorced Ron and married appellant the next year.

By the time K.M. was twelve, appellant would give her a back rub every night after she said her prayers. Soon the back rubs changed, and appellant

---

[1]Although appellant challenges the denial of his motions for an instructed verdict, the points actually attack the legal sufficiency of the evidence. *See Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990), *cert. denied*, 499 U.S. 954 (1991).

would tell K.M. to take her shirt off and pull her shorts down a little. In the spring of 1991, appellant touched her "on the pubic hair" during one of the back rubs. Appellant then decided that he and K.M. needed to "date" and spend every Tuesday night together. This included sleeping in the same bed. Appellant claimed that this was part of the family's bonding process.

In the summer of 1991, appellant took his clothes off, got in a sleeping bag with K.M., and pulled her on top of him. He put his erect penis between her legs, and his penis touched her "genital area." Later that summer, appellant and K.M. were sleeping together nude when appellant pulled K.M. on top of him. He put his erect penis between her legs and pushed against her "pubic" or "genital" area. In June 1992, appellant took K.M. into his bedroom for a "nap." They undressed, and appellant pulled her on top of his erect penis, touching her "genital area."

These incidents and more finally led to appellant having sex with K.M. in September 1993. Two days later, appellant "married" K.M. in a mock ceremony and continued having sex with her until early 1995.[2] K.M. finally told her mother about the long-term abuse, and her mother took her to the police. At trial, Eleanor testified that once while she visited appellant in jail, he wrote

---

[2]Appellant was a devoted correspondent and would send letters and cards to K.M., signing them "Dad, friend, and partner for life." [IX RR 165]

"adultery with [K.M.]" on a piece of paper when she told him that he needed to confess if he was sorry for what he had done to K.M.

B. Standard of Review

In reviewing the legal sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the jury's verdict. *See Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 975 (1993). The critical inquiry is whether, after so viewing the evidence, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1192 (1995). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979).

The legal sufficiency of the evidence is a question of law. The issue on appeal is not whether we as a court believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *See Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991); *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App.), *cert. denied*, 469 U.S. 892 (1984). The verdict

may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *See Matson*, 819 S.W.2d at 846.

C. June 1992 Sexual Assault

1. Timing of the outcry

In his sixth point, appellant argues that he should be acquitted of one of the sexual assault convictions because K.M. did not tell her mother about the abuse until "years after the offense" and there was nothing to corroborate K.M.'s version of events.

Appellant bases his argument on the version of article 38.07 that was in effect in June 1992, the date of the charged offense of sexual assault:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense. The court shall instruct the jury that the time which lapsed between the alleged offense and the time it was reported shall be considered by the jury only for the purpose of assessing the weight to be given to the testimony of the victim.[3]

---

[3]Act of May 26, 1983, 68th Leg., R.S., ch. 382, § 1, 1983 Tex. Gen. Laws 2090, 2090-91 & Act of May 29, 1983, 68th Leg., R.S., ch. 977, § 7, 1983 Tex. Gen. Laws 5317, 5319.

This statute was amended in 1993 to provide that the outcry had to occur within one year after the offense only if the victim was 18 or older and delete the jury instruction requirement.[4] Appellant posits that because K.M. was 14 at the time of the June 1992 sexual assault, K.M. was required to tell her mother within six months under the law in effect at the time of the offense; thus, because there was no outcry for about three years, the evidence was legally insufficient.

The statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely "removes existing restrictions upon the competency of certain classes of persons as witnesses" and is, thus, a rule of procedure. *Hopt v. Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210, 28 L. Ed. 262, 269 (1884). Further, there is no showing that the legislature intended that article 38.07 not be a rule of procedure and apply as of the date of the offense. *See generally Lindquist v. State*, 922 S.W.2d 223, 227 n.4 (Tex. App.—Austin 1996, pet. ref'd). As a rule of procedure, it applies to pending and future prosecutions. *See Zimmerman v. State*, 750 S.W.2d 194, 202-04 (Tex. Crim. App. 1988). Thus, the law in effect at the time of appellant's trial in 1997 applies, which is the version amended in 1993.

---

[4]*See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3765-66 (currently at TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1998)).

Accordingly, because K.M. was younger than 18 at the time of the offense, the one-year time limit on her outcry does not apply. We overrule appellant's sixth point.[5]

2. Sexual organ contact

In his fifth point, appellant claims that the evidence was legally insufficient to support the sexual assault conviction because K.M.'s testimony that appellant touched her "genital area" with his penis is not specific enough to prove that his penis contacted K.M.'s sexual organ in June 1992. Appellant concedes that if K.M. had testified that appellant's penis touched her "genitals" or "genitalia," the evidence would be sufficient. *See Aylor v. State*, 727 S.W.2d 727, 729-30 (Tex. App.—Austin 1987, pet. ref'd) (citing *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977)).

Sexual assault is proven when the State shows that the defendant "intentionally or knowingly cause[d] the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." TEX. PENAL CODE ANN. § 22.011(a)(2)(C) (Vernon Supp. 1998). "'[G]enitals' includes the vulva which immediately surrounds the vagina." *Clark*, 558 S.W.2d at 889. If K.M. had testified, as appellant desired, that appellant contacted her "genitals," that would have encompassed the "genital area," i.e., the area surrounding the genitals. Further, it would be untenable to find that the genital area does not include the genitals. Thus, K.M.'s testimony was legally sufficient to prove that appellant contacted her sexual organ with his penis. We overrule point five.

D. Summer of 1991 Aggravated Sexual Assaults

In his third and fourth points, appellant argues that K.M.'s testimony that appellant's penis touched her "genital area" and "pubic area" was legally insufficient to support his two convictions for aggravated sexual assault. As we stated above, "genital area" is sufficient to prove "genitals." Further, K.M. affirmed that appellant's penis was erect when "it was up against [her] genital." We need not decide whether K.M.'s testimony that appellant touched her "pubic area" was sufficient to prove "sexual organ" because K.M. also testified that appellant's penis touched her "genital area" on that occasion. We overrule points three and four.

E. Spring of 1991 Indecency With a Child

In his second point, appellant claims that the evidence was legally insufficient to uphold his conviction for indecency with a child based solely on K.M.'s testimony that appellant touched her "on the pubic hair."

---

[5]In three supplemental points, appellant asserts that this argument also applies to three of the indecency with a child counts, which occurred in March, June, and July of 1993. Because we have held that the 1993 version of the statute applied to appellant, we overrule supplemental points seven, eight, and nine.

Indecency with a child requires "sexual contact" between the victim and the defendant. TEX. PENAL CODE ANN. § 21.11 (Vernon 1994). Sexual contact is defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." *Id.* § 21.01(2). The external genital organs include the mons pubis, which is "the rounded eminence in front of the pubic symphysis [that] is formed by a collection of fatty tissue beneath the integument. It becomes covered with hair at the time of puberty." CHARLES M. GOSS, GRAY'S ANATOMY 1405 (26th ed. 1954). Thus, by touching K.M.'s pubic hair, appellant touched a part of her genitals. The evidence was legally sufficient and we overrule appellant's second point.

III. FAILURE TO REVEAL IMPEACHMENT EVIDENCE

In his first point, appellant argues that the trial court should have granted him a new trial because the State failed to disclose that Eleanor had another man's child while appellant was in prison. The State does not dispute that it did not disclose this evidence to appellant.

We review the denial of a motion for new trial based on newly-discovered evidence under an abuse of discretion standard. *See Driggers v. State*, 940 S.W.2d 699, 709 (Tex. App.—Texarkana 1996, pet. ref'd) (op. on reh'g). The State must produce exculpatory as well as impeachment evidence to a

defendant. *See Kyles v. Whitley*, 514 U.S. 419, ___, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490, 505 (1995). *See generally Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, the record must reflect that (1) the newly-discovered evidence was unknown to the movant at the time of trial; (2) the movant's failure to discover the evidence was not due to his want of diligence; (3) the evidence was admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the evidence was probably true and would probably bring about a different result in another trial. *See Moore v. State*, 882 S.W.2d 844, 849 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1114 (1995); *see also Gowan v. State*, 927 S.W.2d 246, 249 (Tex. App.—Fort Worth 1996, pet. ref'd).

Any evidence showing Eleanor's sexual relationship with another man and proving that she had his baby would be inadmissible as impeachment evidence. *See* TEX. R. CRIM. EVID. 608(b); *Ramos v. State*, 819 S.W.2d 939, 942 (Tex. App.—Corpus Christi 1991, pet. ref'd). Because the evidence was inadmissible, the State did not have to produce it, and the trial court did not abuse its discretion in not allowing its admission. We overrule point one.

IV. Conclusion

Because we find that the evidence was legally sufficient and the trial court did not abuse its discretion in denying appellant's motion for new trial, we affirm the trial court's judgments.[6]

PER CURIAM

PANEL F: HOLMAN, J.; CAYCE, C.J.; and DAY, J.

PUBLISH

FEB 12 1998

[6]Appellant has filed a letter asking us to reprimand or replace his court-appointed attorney. His only complaint with counsel is that counsel is not communicating with him. Unless an appellant waives counsel and chooses to represent himself or shows an adequate reason for new counsel, appellant must accept the counsel appointed by the court. *See Halliburton v. State*, 928 S.W.2d 650, 651-52 (Tex. App.—San Antonio 1996, pet. ref'd); *see also Hubbard v. State*, 739 S.W.2d 341, 344 (Tex. Crim. App. 1987). Appellant has done neither, and we deny his requests.

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-97-197-CR

SCOTT LESLIE CARMELL — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY

ORDER

We have considered the "Appellant's Motion For Rehearing."

It is the opinion of the court that the rehearing should be and is hereby denied and that the opinion and judgment of February 12, 1998 stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

DATED THIS 26th day of March, 1998.

PER CURIAM

PANEL F: HOLMAN, J.; CAYCE, C.J.; and DAY, J.

PETITIONER'S APPENDIX-B

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

September 16, 1998
COA#: 02-97-00197-CR
RE: Case No. 0837-98
STYLE: CARMELL, SCOTT LESLIE

On this day, the Appellant's Pro Se Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

INTERAGENCY MAIL

SCOTT LESLIE CARMELL
TDCJINMATE #777548
2101 FM 369 NORTH
ALLRED UNIT - UNIT #069
IOWA PARK TX 76367

38-04

9/25/98

PETITIONER'S APPENDIX-C

BEST AVAILABLE COPY

No. 98-7540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCOTT L. CARMELL — PETITIONER
(Your Name)

VS.

THE STATE OF TEXAS — RESPONDENT(S)

PROOF OF SERVICE

I, Scott L. Carmell, do swear or declare that on this date, December 1 —, 1998, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Mr. Dan Morales, Attorney General, State of Texas,

P.O. Box 12548, Capitol Station, Austin, Texas 78711.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 1, 1998

Scott L. Carmell
(Signature)